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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 990

CLARENCE CROMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA WITH BRIEF IN SUP-
PORT THEREOF.

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INDEX.

TABLE OF CONTENTS.

	Page
Petition for Writ of Certiorari.....	1
Opinion of court below.....	2
Jurisdiction of this Court.....	2
Questions presented.....	2
Statutes involved.....	4
Statement of the case.....	8
Reasons for granting the writ.....	14
Prayer.....	19
Brief in Support of Petition.....	21
Opinion of court below.....	21
Jurisdiction of this court.....	21
Statement of the case.....	22
Specification of errors.....	22
Argument:	
Point 1—Material and fatal variance as to quantity.....	23
Point 2—Material and fatal variance as to misdescription of mechanical mixture.....	24
Point 3—Counts 1, 3, 5, 7 & 9 each fails to state a crime.....	25
Point 4—Denial of petitioner's motion for a mistrial.....	28
Point 5—Illegal search of petitioner's home and premises, without arrest warrant or search warrant.....	29
Point 6—Uncertain, ambiguous and illegal accumulated harsh sentences imposed upon petitioner.....	32
Conclusion.....	34

CASES CITED.

<i>Agnello v. U. S.</i> , 269 U. S. 20, 30, 31-32.....	31
<i>Berger v. U. S.</i> , 295 U. S. 78, 80.....	16, 18, 23, 23
<i>Boyd v. U. S.</i> , 116 U. S. 616, 624-630.....	31

	Page
<i>Coonan v. U. S.</i> , 26 F.(2), 870 (CCA, 8, 1928) . . .	2, 16, 23, 24
<i>De Jonge v. Oregon</i> , 299 U. S. 353, 362	25
<i>Fleisher et al. v. U. S.</i> , 302 U. S. 218 (1937) . .	3, 17, 18, 26, 33
<i>Gouled v. U. S.</i> , 255 U. S. 298, 308	31
<i>Guilbeau v. U. S.</i> , 288 F. 731 (CCA, 5, 1923) . . .	2, 15, 23, 24
<i>MacIntosh v. U. S.</i> , 1 F. (2) 427 (CCA, 7, 1923) . . .	2, 16, 24
<i>Silverthorne Lumber Co. v. U. S.</i> , 251 U. S. 385, 391 . . .	31
<i>State v. Driver</i> , 78 North Carolina, 423, 427	34
<i>St. Louis, San Francisco & Tex. Ry. v. Seale</i> , 229 U. S.	
156, 161	25
<i>Taylor v. U. S.</i> , 286 U. S. 1-6	32
<i>U. S. v. Daugherty</i> , 269 U. S. 360, 364	4, 33
<i>U. S. v. Tom Yu</i> , 1 Fed. Supp. 357	31
<i>Weeks v. U. S.</i> , 232 U. S. 383, 393	31
<i>Weems v. U. S.</i> , 217 U. S. 349 (1910)	4, 34

STATUTES CITED

Judicial Code, sec. 240 (a), as amended by act of Feb.	
13, 1925, chap. 229, sec. 1, 43 Stat. 938, T. 28,	
U. S. C. A. sec. 347 (a)	2, 21, 22
Harrison Anti-Narcotic Act' 26 U. S. C. A. secs. 2553	
(a) and 2554 (a) and 2554 (f)	2, 4, 5, 9, 12, 15, 16, 22
Narcotic Drugs Import & Export Act (commonly known	
as Jones-Miller Act) 21 U. S. C. A., sec. 174	2, 5, 9, 15
Penalty for violation of Harrison Narcotic Act, T. 26,	
U. S. C. A., sec. 2557 (b)	5
T. 5, sec. 281 (c) U. S. C. 1940, transfer of control of	
narcotics to Secretary of Treasury	6
T. 26, U. S. C., 1940, sec. 2606, delegation of powers	
and duties of Secretary of Treasury	6, 17
46 Stat. 585, act June 14, 1930, creating Bureau and	
Commissioner of Narcotics	6

TREASURY DECISIONS

Treasury Decision, T. D. No. 2, July 1, 1930, pre-	
scribing duties of Commissioner of Narcotics	6, 12
Treasury Decision, T. D. 4884, Feb. 11, 1939, placing	
Collectors of Internal Revenue under authority of	
the Commissioner of Narcotics in respect to narcotic	
taxes	8, 12, 17

CONSTITUTION OF U. S.

	Page
Fourth Amendment.....	19,29,30
Fifth Amendment.....	18,19,27,28,29,32,34
Sixth Amendment.....	27
Eighth Amendment.....	19,32,34



SUPREME COURT OF THE UNITED STATES

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No.

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Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA.**

*To the Honorable, the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Your petitioner, Clarence Cromer, respectfully submits this his petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, affirming (Rec. 106) conviction of petitioner on an indictment, containing twelve counts, charging violation of the Harrison Anti-Narcotic Act and the Narcotic Drugs Import and Export Act (commonly known as the Jones-Miller Act), in the District Court of the United States for the District of Columbia.

Opinion of Court Below.

The opinion of the Court below, announced March 20, 1944, not yet printed in official volume, is contained on pages 104-106 of the record.

The petition of petitioner for a rehearing is set forth in the record at pages 108-113 and was denied by order of the Court below on April 7, 1944, and is contained in the record at page 114.

Jurisdiction of this Court.

The jurisdiction of this Court is invoked in this case under sec. 240 (a) of the Judicial Code as amended by the act of February 13, 1925, chap. 229, sec. 1, 43 Stat. 938, Title 28, U. S. C. A. sec. 347 (a).

Questions Presented.

1. Whether a material and fatal variance exists between the allegations of the counts of the indictment and the proof of the government, in a prosecution under the Harrison Anti-Narcotic Act (26 U. S. C. A. secs. 2553 (a) and 2554 (a)) and the Narcotic Drugs Import and Export Act (commonly known as the Jones-Miller Act, 21 U. S. C. A. sec. 174), in respect to quantity alleged and misdescription of substance, there being a conflict of decisions with reference thereto, namely, the decision of the United States Court of Appeals for the District of Columbia in the instant case conflicts with the case of *Guilbeau v. United States*, 288 Fed. 731 (CCA, 5, 1923), holding that such variance is fatal to a conviction, which latter case is in conflict with *MacIntosh v. United States*, 1 F. (2) 427 (CCA 7, 1923), and the decision of the Court of Appeals in the instant case is also in conflict with *Coleman v. United States*, 26 Fed. (2), 870 (CCA, 8, 1928) which is in conflict with *MacIntosh v. United States*, *supra*.

2. Whether counts 1, 3, 5, 7 and 9 of the indictment, or any of said counts, set forth an offense under the Harrison Anti-Narcotic Act, *supra*, in view of the misdescription in each of said counts in relation to the allegation that a sale of heroin hydrochloride was made by petitioner to one Rufus Ford "not in pursuance of a written order from the said Rufus Ford on a form issued in blank for that purpose *by the Commissioner of Internal Revenue*" instead of an allegation that such sale was made not in pursuance of a written order from said Rufus Ford on a form prescribed *by the Commissioner of Narcotics* and issued in blank for that purpose *by a Collector of Internal Revenue*, as required by law. (This point is material, *Fleisher et al. v. United States*, 302 U. S. 218 (1937).

3. Whether petitioner's motion for a mistrial should have been granted (Rec. 46, 47, 54, 61, 70, 52, 63, 67) in view of the misconduct (Rec. 46, 47) of two government witnesses who violated the order of court not to discuss the facts involved in the instant case with other witnesses, whilst all witnesses were under the usual rule of separation (Rec. 28, 46).

Petitioner respectfully submits that it is imperative that a uniform rule of practice and procedure for all federal District Courts be laid down by this Court as a guide, especially when the same witnesses are constantly recalled to testify in support of different counts of an indictment which was the situation in the instant case (Rec. 30-35; 45, 47; 54-55; 61-63; 71-76). Narcotic Agent Fields was recalled five times (Rec. 35-38; 43-45; 52-54; 63-64; 67-70).

4. Whether the use of evidence by the prosecution, over objection and exception by petitioner (Rec. 67, 69, 71, 72, 73, 78, 79, 80-1), obtained by illegal search and seizure of petitioner's home and premises, without a warrant of arrest and without search warrant, was in violation of the Fourth and Fifth Amendments to the Federal Constitution.

5. Whether the accumulated harsh sentences (*U. S. v. Daugherty*, 269 U. S. 360, 364) on each and all of the twelve counts of the indictment, aggregating fifteen years, are void for uncertainty and ambiguity, and illegal, and, therefore, in violation of the due process clause of the Fifth Amendment to the Federal Constitution; and whether the same inflicts cruel and unusual punishment upon petitioner, by the method of the imposition of said sentences, in violation of the Eighth Amendment to said Federal Constitution (*Weems v. U. S.* 217 U. S. 349 (1910)).

Statutes Involved.

Title 26 U. S. C. sec. 2554 (a) (part of the Harrison Anti-Narcotic Act relating to counts 1, 3, 5, 7 and 9 of the instant case):

“It shall be unlawful for any person to sell, barter, exchange or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.”

Subsection (f) of said sec. 2554 provides:

“The Secretary [of the Treasury] shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to *collectors [of internal revenue]* for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by said sections in his district.” * * * (*italics supplied*)

Title 26 U. S. C. sec. 2553 (a) (part of the Harrison Anti-Narcotic Act, relating to count eleven (11) of the instant case):

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.”

Title 26, U. S. C. sec. 2557 (b) provides, for the violation of the aforesaid secs. 2554 (a) and 2553 (a), a penalty, on conviction, of a fine of not more than \$2,000 or be imprisoned for not more than five years, or both, in the discretion of the court.

Title 21 U. S. C. sec. 174 (part of the Narcotic Drugs Import and Export Act, commonly known as the Jones-Miller Act, relating to counts 2, 4, 6, 8, 10 and 12 of the instant case):

“If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

Title 5, sec. 281c, U. S. Code, 1940 provides:

"Sec. 281 c. Transfer of control of narcotic drugs to Secretary of Treasury.

"The rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any laws in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of narcotic drugs are hereby transferred to, and conferred and imposed upon, the Secretary of the Treasury. (Mar. 3, 1927, ch. 348, sec. 4 (a), 44 Stat. 1382.)"

Title 26 U. S. C., sec. 2606, relating to the delegation of powers and duties of the Secretary of the Treasury, applicable to counts 1, 3, 5, 7, 9 and 11 of the indictment in the instant case:

"The Secretary is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs conferred upon him by sub-chapters A and B of this chapter and part V of sub-chapter A of chapter 27 upon the Commissioner of Narcotics, or any officer or employe of the Bureau of Narcotics, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges and powers, and duties which in the opinion of the Secretary, may be necessary in connection with internal revenue taxes.

By act of Congress, approved June 14, 1930 (46 Stat. 585) there was created in the Department of the Treasury a Bureau known as the Bureau of Narcotics an office of Commissioner of Narcotics.

On July 1, 1930, by T. D. No. 2, the Secretary of the Treasury promulgated an order prescribing the duties and powers of the Commissioner of Narcotics and other officers and employes of the aforesaid Bureau of Nar-

coties, pursuant to the authority contained in the afore-said act of Congress approved June 14, 1930 (46 Stat. 585) as follows:

“III. Rights, privileges, powers and duties conferred and imposed upon the Commissioner of Narcotics.

“(1) There are hereby conferred and imposed upon the Commissioner of Narcotics, subject to the general supervision and direction of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision [a] of section 4 of the act of March 3, 1927) by the act of December 17, 1914, as amended, known as the Harrison Narcotic Law, or by the act entitled, ‘An Act regulating the manufacture of smoking opium within the United States and for other purposes,’ approved January 17, 1914, in so far as such rights, privileges, powers, and duties relate to—

“(a) The investigation and the detection and punishment of violations of either of the above laws or any regulations issued thereunder; * * *

“(d) *The prescribing of forms and order forms under any of the above acts;*

* * * * *

“(2) Power is hereby conferred upon the Commissioner of Narcotics to prescribe such regulations as he may deem necessary for the execution of the functions imposed upon him or upon the officers of employees of the Bureau of Narcotics, but all regulations and changes in regulations shall be subject to the approval of the Secretary of the Treasury. * * *”
(Italics supplied.)

Pursuant to the foregoing authorization the Secretary of the Treasury issued the following Treasury Decision

4884, which retained in force Treasury Decision No. 2 of July 1, 1930, *supra*, directing the Commissioner of Narcotics to prescribe the order forms required under the Harrison Act and to issue same to the Collectors of Internal Revenue.

(T. D. 4884)

Prescribing regulations under the internal-revenue Code

TREASURY DEPARTMENT, *February 11, 1939.*

To Collectors of Internal Revenue and Others Concerned:

All regulations (including all Treasury decisions), prescribed by, or under authority duly delegated by, the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the internal-revenue code, to the extent such provision of law is superseded by the code, are hereby prescribed under, and made applicable to, the provisions of the code corresponding to the provisions of law so superseded, insofar as any such regulation is not inconsistent with the code.

These regulations are issued under authority of the provisions of sections 1928, 2559 and 2606 of the internal-revenue code and under such other provisions of the code as correspond with the several provisions of law under which any regulation or Treasury decision hereby prescribed and made applicable was issued.

H. MORGENTHAU, JR.,
Secretary of the Treasury.

[Filed with the Division of the Federal Register February 11, 1939, 1:53 p. m.]

Statement of the Case.

Petitioner was convicted (upon the testimony of one Rufus Ford, an ex-convict, with a long criminal record (Rec. 51-52) after trial by jury, in the District Court of the

United States for the District of Columbia, upon an indictment containing twelve counts. Counts 1, 3, 5, 7 and 9 (sales) and 11 (purchase) for alleged violation of the so-called Harrison Anti-Narcotic Act (26 U. S. C. A. secs. 2554(a) and 2553(a)) and counts 2, 4, 6, 8, 10 and 12 charged violation of the Narcotic Drugs Import and Export Act (commonly known as the Jones-Miller Act, 21 U. S. C. A. sec. 174).

After motion for new trial was overruled, the court imposed upon petitioner the following uncertain, ambiguous and illegal sentence:

“whereupon it is considered by the court that for his said offense the defendant be committed to the custody of the Attorney-General or his authorized representative for imprisonment for the period of Forty (40) months to Ten (10) years and pay a fine of Five Thousand (\$5,000.00) Dollars on count two; and Forty (40) months to Ten (10) years on each of counts four, six, eight, ten, and twelve, *each count to run concurrently and concurrently with count two*; and twenty (20) months to Five (5) years on count one, to take effect at expiration of sentence imposed on count two; and Twenty (20) months to Five (5) years on each of counts three, five, seven, nine, and eleven, *each count to run concurrently and concurrently with sentence imposed on count one*; and thereupon the court fixed the amount of bond on appeal in this case at Twenty-five thousand (\$25,000.00) Dollars.” (Rec. 11-12.)

There was a material and substantial variance between the allegation in each count of the indictment, in respect to the quantity or number of grains or heroin hydrochloride, and also in regard to the description of the drug alleged in the indictment and the substance submitted by and received in evidence in behalf of the prosecution, viz., the allegation in each count of the indictment alleges the drug to be heroin hydrochloride and the evidence produced

by the prosecution showed the substance was a mechanical mixture chiefly composed of milk sugar or cane sugar with a small quantity of heroin hydrochloride, which is quite different from heroin hydrochloride, as alleged in each count of the indictment. Its physical and therapeutical or medicinal properties are entirely different.

To make clear the ground of petitioner's objection as to the material and fatal variance between allegation in each of the twelve counts, and the testimony produced by the Government, in respect to the quantity of heroin hydrochloride alleged in each count, the record discloses the following:

Indictment alleges.	Proof produced by the Government's chemist.
Count 1. 289 grains (Rec. 1)	4.29 grains (Rec. 39)
Count 2. 289 grains (Rec. 2)	*
Count 3. 383 grains (Rec. 2)	2.82 grains (Rec. 48)
Count 4. 383 grains (Rec. 2-3)	*
Count 5. 259 grains (Rec. 3)	3.84 grains (Rec. 55)
Count 6. 259 grains (Rec. 3)	*
Count 7. 415 grains (Rec. 3)	6.15 grains (Rec. 64)
Count 8. 415 grains (Rec. 4)	*
Count 9. 97 grains (Rec. 4)	1.44 (Rec. 78)
Count 10. 97 grains (Rec. 4-5)	*
Count 11. 2,705 grains (Rec. 5)	40.03 (Rec. 78)
Count 12. 2,705 grains (Rec. 5)	*
<hr/> Totals 8,301 grains	<hr/> 58.5

* Indicates that the theory of the Government was that the minimum quantity shown by the proof in support of the odd numbered counts was proof in support of the even numbered counts, in respect to the quantity alleged.

The foregoing variances the petitioner contended at the trial were fatal as well as prejudicial, because they were contrary to the allegations of the indictment (Rec. 40-1); objection and exception as to samples put in evidence by

the prosecution as tending to support the large quantity alleged, counts 1 & 2 (Rec. 49-50), counts 3 & 4 (Rec. 57-58); counts 5 & 6 (Rec. 65-66); counts 7 & 8 (Rec. 80-82); counts 9, 10, 11 & 12 (Rec. 79, 80, 81).

The testimony of the government chemist, in behalf of the prosecution, disclosed that of the total of 8,301 grains, alleged in the twelve counts of the indictment to be heroin hydrochloride, disclosed the same was a mechanical mixture and contained only 58.6 grains of heroin hydrochloride and the remainder was 8,242.4 grains of milk sugar or cane sugar (Rec. 79).

The court overruled petitioner's objections, severally made, as indicated above, to the introduction, by the prosecution, of the said samples, as tending to prove the allegation in each count of the indictment in respect to the large quantities and description of the alleged drug therein set forth, upon the ground of material variances between allegation and proof (Rec. 40, 41, 46-50, 57-58, 65-66, 79-80).

The point of fatal variances between allegation and proof was also raised by petitioner, at the conclusion of all the evidence in the case, by motion to direct a verdict in favor of petitioner, which was overruled, to which exception was noted by petitioner (Rec. 82). The point of fatal variances was also made by petitioner's proffered prayers Nos. 1 to 9, inclusive (Rec. 82-85), each of which was overruled, and exception taken (Rec. 83, 84, 85).

The trial court charged the jury that if they found the so-called substance sold by petitioner contained any heroin hydrochloride, and that such sale or sales were not made on the written form prescribed and issued for that purpose by the Secretary of the Treasury, then the jury would be warranted in finding petitioner guilty as charged in any one or all of the particular counts as the case may be (Rec. 93), which was to say that an infinitesimal quantity of heroin

hydrochloride found in the mechanical mixture put in evidence by the prosecution would justify a verdict of guilty,—this in direct contradiction of the large quantities of heroin hydrochloride alleged in the various counts of the indictment. The United States Court of Appeals for this District held that inasmuch as petitioner was “defrauding his illicit customers” (Rec. 104) the variance was not fatal (Rec. 104). The said appellate court also held that the variance was not a substantial one (Rec. 105).

The trial court charged the jury that the authority to issue the order forms was vested in the Secretary of the Treasury (Rec. 93), but the Court of Appeals held that “while it appears that the power to prescribe order forms has been delegated to the Commissioner of Narcotics, we are satisfied that the power to issue such forms is vested in the Commissioner of Internal Revenue. Therefore, the charge in the indictment was proper” (Rec. 104 et seq.). This ruling is contrary to Title 26, U. S. C., sec. 2554 (f), and sec. 2606, and Treasury Decisions No. 2, of July 1, 1930, and No. 4884, dated February 11, 1939, which delegated the power to prescribe such forms to the Commissioner of Narcotics, and to be distributed to and issued by the Collectors of Internal Revenue.

Petitioner moved the trial court to withdraw a juror and declare a mistrial (Rec. 47) on the ground of the misbehavior of two government witnesses, namely, Narcotic Agents Trigstead and Fields, when said Trigstead admitted on the witness stand that during the noon recess of the court he and said Fields had discussed the testimony previously testified to by said Fields as to who in the office of the narcotic division (wherein government exhibits in this case were kept) had access to the safe in said office, which resulted in a change in the testimony on the part of the witness Trigstead (who testified after said discussion

between him and said Fields), despite the fact that the court had, prior to the beginning of the trial, laid all witnesses under the usual rule (Rec. 28) and ordered the witnesses not to discuss the facts of the case with any one, or among themselves, during the recess of court, while the case was on trial (Rec. 46, 47).

The foregoing point is of general importance in the trial of cases in the federal courts of the United States, and counsel for the petitioner understands that the practice varies in the federal courts. A uniform rule in regard thereto should be laid down by this Court, that is to say, whenever the trial judge places all witnesses under the usual rule, prior to the beginning of the trial, to remain out of the court room until called to testify in court, and also not to discuss the facts of a case on trial with other witnesses, during recess of the court, if a witness disobeys such instructions of the court and discusses the facts of the case with another witness (who has already testified in court), what should be the practice and procedure? Was Petitioner's motion for a mistrial proper?

The foregoing point was briefed and presented to the Court of Appeals of this District, but the opinion of the court failed to refer specifically thereto, that Court merely stating, in its opinion, that "the other grounds" urged by petitioner for a reversal were "without merit." This included that point. But in the petitioner's petition for rehearing in the lower appellate court the point was again specifically called to the attention of that court but the petition was denied, without opinion (Rec. 114). The misbehavior of the two government witnesses in discussing their testimony, during the recess of the court, in violation of the court's order, should have resulted in ordering a mistrial at petitioner's request. Exception was taken to the court's ruling overruling said motion (Rec. 46-7).

The evidence of the prosecution disclosed that the samples had been delivered by the narcotic agents (government witnesses) to one R. S. Keefer, a clerk in the office of the chemist, and he was not produced at the trial as a witness (Rec. 82).

Because petitioner raised the question during the trial of the failure of proof of continuity of custody of the samples put in evidence by the prosecution (Rec. 87, 98), petitioner's constitutional rights under the Fourth and Fifth Amendments to the Federal Constitution were violated to his injury and prejudice by the reversible error committed in admitting in evidence, over objection and exception of petitioner (Rec. 80-81) Gov. Ex. 8 (which consisted of a cardboard box containing 8 small envelopes in each of which was a white powdered substance—a mechanical mixture, 2705 grains, of which 40.03 grains were heroin hydrochloride and the rest was milk sugar, being numbered, respectively, 8a to 8h, inclusive, placed in a large envelope, Gov. Ex. 12) to supply proof of counts 11 and 12 of the indictment, *said exhibits having been found on a shed on premises adjoining defendant's home, and which were seized by narcotic agents when they unlawfully entered defendant's home and yard, without a search warrant, or any warrant of arrest, when the defendant was taken into custody, no proof having been offered by the Government tending to show that said exhibits were the property of defendant, said transaction being an unlawful search and seizure* (Rec. 81).

The judgment imposing sentence upon petitioner (Rec. 11-12) upon each count of the indictment, is, upon its face, void, for uncertainty and ambiguity, as will be hereinafter particularly pointed out.

Reasons for Granting the Petition.

Petitioner respectfully submits that the foregoing questions, presented by the Record, are of exceptional and far

reaching general importance and to secure uniformity of decision are such as to justify a review by this Court—this for the following reasons:

I.

There was a material and fatal variance between the allegation in each count of the indictment and the evidence or proof submitted by and received in behalf of the prosecution, over objections and exceptions of petitioner, in regard to:

(a) The quantity or number of grains of heroin hydrochloride, when the exact number of such substance was definitely known by the government chemist, Dr. Speer (who testified at the trial), before and at the time this case was presented to the grand jury, which returned the indictment against petitioner.

(b) The description of the drug as alleged in the indictment and the substance submitted by and received in evidence in behalf of the prosecution, viz: the allegation in each count described the drug as heroin hydrochloride and the evidence produced by the prosecution showed the substance was a mechanical mixture consisting chiefly of milk sugar or cane sugar with a small quantity of heroin hydrochloride. Its physical and therapeutical or medicinal properties are entirely different. The trial court refused to direct a verdict of acquittal, at the conclusion of all the evidence in the case, and charged the jury that the variance between the allegation and the proof was immaterial. The United States Court of Appeals for the District of Columbia affirmed the ruling, which decision of the said appellate court in the instant case, upon the foregoing question of variance in respect to prosecutions under the Harrison Anti-Narcotic Act (26 U. S. C. A. secs. 2553 (a) and 2554 (a)) and the Narcotic Drugs Import and Export Act (commonly known as Jones-Miller Act, 21 U. S. C. A. sec. 174 conflicts with *Guilbeau v. U. S.*, 288 Fed.

731 (CCA, 5, 1923) holding such variance fatal, which latter case conflicts with *MacIntosh v. U. S.*, 1 Fed. (2) 427 (CCA, 7, 1923). The opinion of the United States Court of Appeals is also in conflict with *Coleman v. U. S.*, 26 Fed. (2) 870 (CCA, 8, 1928) which holds that in a prosecution for unlawful sale of morphine under the Harrison Anti-Narcotic act, proof establishing the sale of sulphate hydrochloride, a derivative of morphine, was insufficient to sustain a conviction, which decision is in conflict with *MacIntosh v. U. S.*, *supra*, as well as in conflict with the decision of the United States Court of Appeals for the District of Columbia in the instant case. In *Berger v. U. S.*, 295 U. S. 78, 80, certiorari was granted by this Court because of a conflict with other circuit courts of appeal in respect of the effect of the alleged variance between allegation and proof.

Counsel for petitioner have been unable, after due diligence, to locate a decision of any of the Circuit Courts of Appeals passing upon such question which arose in the prosecution under the Jones-Miller act.

II.

Whether in any one of the counts 1, 3, 5, 7, and 9 of the indictment a crime is stated under the Harrison Anti-Narcotic act (26 U. S. C. A., secs. 2553(a) and 2554(a)) by reason of a material, fatal variance between the allegation in each of said counts and the statute, in that the allegation in each of said counts is that the alleged sale of narcotics was made "*not in pursuance of a written order from the said Rufus Ford on a form issued in blank for that purpose by the Commissioner of Internal Revenue*" whereas the authority under the law to issue such written order is vested in the *Commissioner of Narcotics (and not in the Commissioner of Internal Revenue)* to prescribe such forms and issue the same to the *Collectors of Internal Revenue*, who, in turn, are

authorized to distribute the same and collect the tax therefor. (This point is material, *Fleisher et al. v. U. S.*, 302 U. S. 218).

The question lastly stated necessarily involves the proper construction of a general statute of the United States, namely, Title 26, sec. 2606, U. S. C., 1940 (53 Stat. 283, same as sec. 2606, I. R. C., 1939) which confers upon *the Commissioner of Narcotics*, or any officer or employe of the Bureau of Narcotics, the rights, privileges and duties in respect of narcotic drugs, originally conferred upon the Secretary of the Treasury by previous federal statutes (subchapter A and B of chapter 23, Title 26, 1940, and chapter 23, I. R. C. and part V of subchapter A of chapter 27, I. R. C.), *and divesting the Commissioner of Internal Revenue of all previous authority conferred upon him by the Secretary of the Treasury by reason of prior administrative regulations.*

There is also involved herein proper construction of Treasury Regulations, since pursuant to Title 26, sec. 2606, U. S. C., 1940, the Secretary of the Treasury by T. D. 4884, February 11, 1939, (retaining in force T. D. #2, of July 1, 1930) transferred all power and authority to the Commissioner of Narcotics to prescribe the required forms under the Harrison Anti-Narcotic Act (26 U. S. C. A. sec. 2553 (a) and 2554 (a)), *and to issue the same to the Collectors of Internal Revenue* for distribution and collection of the tax.

Each of the foregoing odd numbered counts of the indictment fails to state an offense by reason of the foregoing misdescription in each of said counts, and each of said counts is fatally defective in view of the authoritative decision of *Fleisher et al v. United States*, 302 U. S., 218 (1937), which was misconstrued and misapplied by the United States Court of Appeals for the District of Colum-

bia, which erroneously held that the *Fleisher* case "apparently conflicted" with the earlier decision of *Berger v. United States*, 295 United States, 78, 82 (1935), the lower appellate court asserting, in its opinion:

"We can discover no cases attempting to reconcile the apparent conflict." (Rec. 104 et seq.) (Italics supplied). There is no conflict.

The said Court of Appeals failed in the instant case to adhere to the principles of law announced in the *Fleisher* case (302 U. S. 218), as well as the *Berger* case (295 U. S. 78, 82), and because of their vital importance in the administration of criminal prosecutions under the Harrison Anti-Narcotic Act, it is submitted that the writ of certiorari should be granted.

III.

Petitioner's motion for a mistrial should have been granted, by reason of the misbehavior of the two government witnesses, who violated the order of the court not to discuss the facts involved in this case, while they, as well as all of the other witnesses, were under the usual rule of separation.

Under the facts and circumstances disclosed by the Record herein, we submit with great respect, that it is imperative that a uniform rule of practice and procedure be laid down by this Court to guide the federal District Courts, to sustain a motion by a party litigant, seasonably made, for a mistrial, in order that such litigant may have a fair and impartial trial and due process of law within the meaning of the Fifth Amendment to the Federal Constitution.

IV.

Whether the use of evidence by the prosecution, over objection and exception by petitioner (Rec. 80-1), obtained by

an illegal search, by narcotic agents and police officers, of petitioner's home and premises without a warrant of arrest or without a search warrant, and the seizure by them of such evidence on a shed adjacent to petitioner's home, was in violation of the Fourth Amendment to the Federal Constitution, as well as the denial of due process of law within the meaning of the Fifth Amendment to said Constitution.

V.

The sentence of the court is on its face void (1) for uncertainty and ambiguity; and (2) the same is illegal, because said sentence deprives petitioner of due process of law within the meaning of the Fifth Amendment to the Federal Constitution, and the same is in violation of the Eighth Amendment to said Constitution in that said sentence inflicts upon petitioner cruel and unusual punishment.

Wherefore, petitioner respectfully prays that the writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a transcript of the record and of all proceedings in this cause (same being entitled Clarence Cromer, appellant, vs. United States of America, appellee, No. 8536 on the docket of said Court of Appeals) to the end that the record and proceedings therein be reviewed by this Honorable Court and the judgment of said Court of Appeals be reversed, with directions to that Court to remand said cause to the District Court of the United States for the District of Columbia to set aside the judgment and sentence imposed upon petitioner and to dismiss the indictment against petitioner, or for such further proceedings not inconsistent with the opinion and judgment of this Honorable Court, and for such other and further relief

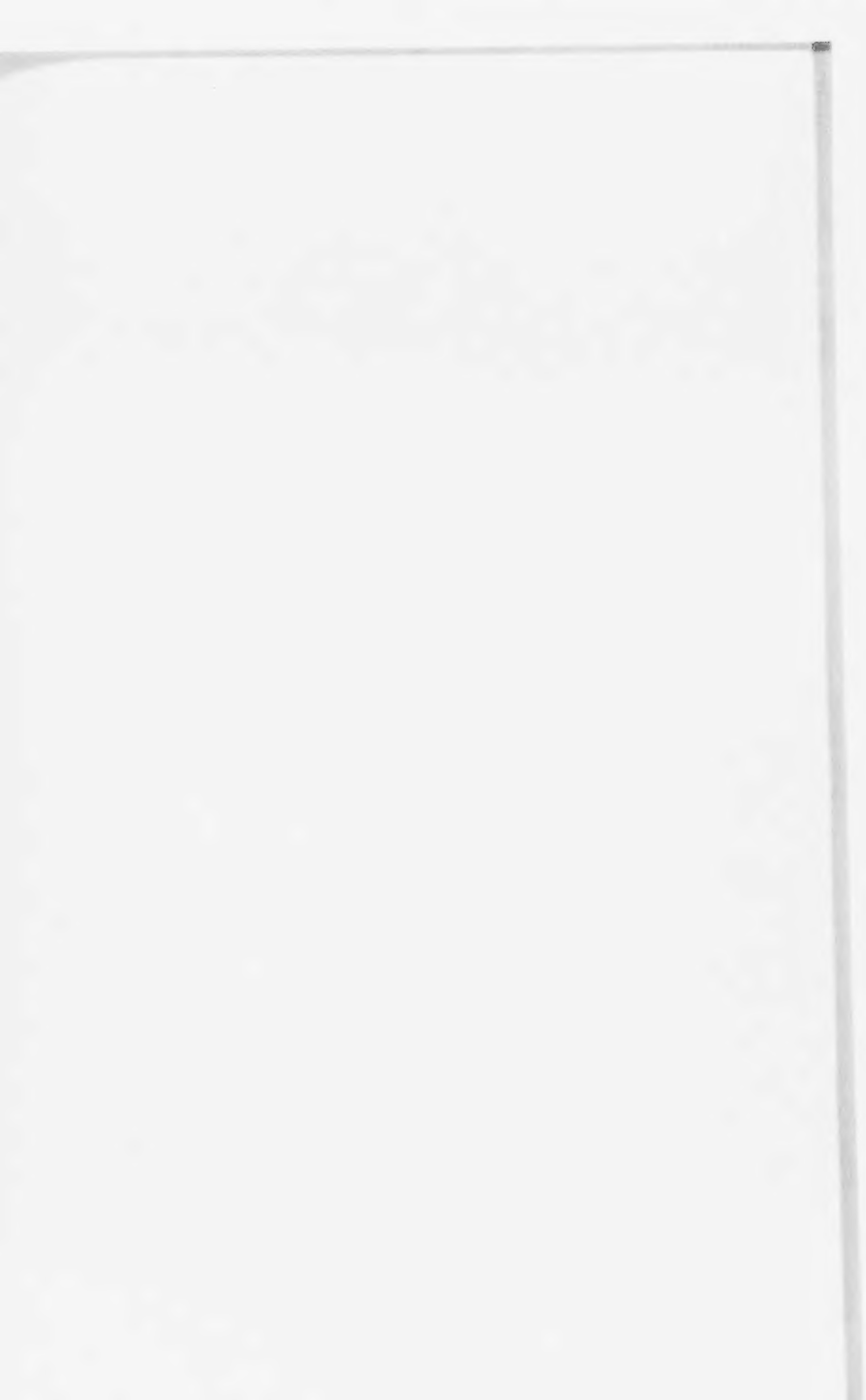
in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

CLARENCE CROMER,
Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

CLARENCE CROMER,

vs.

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinion of the Court Below.

The opinion of the United States Court of Appeals for the District of Columbia, announced March 20, 1944, not yet in official volume, is contained on pages 104 et seq. of the Record.

Petitioner filed his petition for rehearing within time, and the same was denied on April 7, 1944. Said petition is contained on pages 108-113 of the Record herein. The judgment of said Court of Appeals affirmed the judgment and sentence of the trial Court, the District Court of the United States for the District of Columbia (Rec. 106).

I.

Jurisdiction.

The jurisdiction of this Court in this case is invoked under sec. 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925, chap. 229, sec. 1, 43 Stat. 938, Title 28, U. S. C. A. sec. 347 (a).

II.

Statement of the Case.

A statement of the case is set forth in the accompanying petition at pages 8-14. Repetition is not made here, but reference thereto is respectfully asked.

III.

Specification of Errors.

The United States Court of Appeals for the District of Columbia erred in the following particulars:

1. In holding that the variance between the allegation in each count of the indictment and the proof of the prosecution as to the quantity or number of grains of heroin hydrochloride was not a material or fatal variance.

2. In holding that the variance between the allegation in each count of the indictment and the proof of the prosecution as to the misdescription of the substance was not a material or fatal variance.

3. In holding that the allegation in counts 1, 3, 5, 7, and 9 of the indictment that the sale of the drug was made "not in pursuance of a written order from the said Rufus Ford, on a form issued for that purpose by the Commissioner of Revenue" stated a crime under sec. 2554 (a) and (f), Title 26, U. S. C., and in not holding that such allegation, under said statute, should have been in substance, "not in pursuance of a written order from the said Rufus Ford, on a form prescribed by the Commissioner of Narcotics and issued for that purpose to a Collector of Internal Revenue."

4. In sustaining the ruling of the trial court in overruling petitioner's motion for a mistrial, over objection and exception of petitioner.

5. In sustaining the ruling of the trial court permitting the use by the prosecution, over objection and exception of petitioner, of certain evidence, seized by the narcotic agents and police acting in concert with said agents, from the roof of a shed located on property adjacent to petitioner's home and premises, without a warrant of arrest and without a search warrant.

6. In affirming the uncertain, ambiguous and illegal, accumulated, harsh sentences imposed upon the petitioner by the trial court.

Argument.

1. As to the material and fatal variance between allegation in each count of the indictment and the proof as to the quantity or number of grains of heroin hydrochloride, the Court of Appeals held that the variance was not fatal, and, among other things, said that "It appeared that appellant [petitioner] was defrauding his illicit customers." The Court also held, erroneously, we submit, that the cases relied upon by petitioner had been overruled by *Berger v. U. S.* 295 U. S. 78, 82 (1935). We submit that the *Berger* case announces the general rule that allegation and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him so that he may be enabled to present his defense and not to be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. We submit that the cases of *Guilbeau v. U. S.*, 288 F. 731 (CCA, 5, 1923) and *Coleman v. U. S.*, 26 F. (2) 870 (CCA, 8, 1928) apply the principles of law decided by this Court in the *Berger* case, *supra*, and

that the Court of Appeals erred in holding that those cases were overruled by the *Berger* case. In the *Guilbeau* case (288 F. 731), *supra*, the Circuit Court of Appeals for the 5th circuit held that in a prosecution under the Harrison Anti-Narcotic law in which the indictment alleged a sale of morphine sulphate, evidence of the sale of morphine hydrochloride was a substantial variance and was not sufficient to sustain a conviction, and the variance was not cured by the act of February 26, 1919 (Comp. St. Ann. Supp. 1919, sec. 1246). And in *Coleman v. U. S.*, 26 F. (2) 870 (CCA 8, 1928) the court held that in a prosecution alleging an unlawful sale of morphine, proof establishing sale of sulphate hydrochloride, a derivative of morphine, was insufficient to sustain a conviction, since sulphate hydrochloride is not morphine. As hereinbefore pointed out, while *the Guilbeau* and *the Coleman* cases are in conflict with the decision of the United States Court of Appeals for this District, in the instant case, as well as the case of *MacIntosh v. U. S.* 1 F. (2) 427 (CCA 7, 1923), we contend that the ruling in *the Guilbeau* and *the Coleman* cases is bottomed upon the principle announced in the *Berger* case (295 U. S. 78, 82).

In the *Berger* case while this Court held that where the proof showed two conspiracies, each fitting the single charge in the indictment, and each participated in by some but not all of the convicted defendants, one of them who was connected by the evidence with one only of the conspiracies revealed by it has no ground to complain of the variance if it did not affect his substantial rights, but this Court said on page 83 (bottom) "We do not mean to say that a variance such as that here dealt with might not be material in a different case."

2. As to the variance between the allegation in each count of the indictment and the proof of the prosecution as to the misdescription of the substance alleged to have been sold

by petitioner to the witness Rufus Ford: In each of the twelve counts the allegation described the substance as heroin hydrochloride (Rec. 1-5) and the evidence produced by the prosecution disclosed that the substance was a mechanical mixture composed chiefly of milk sugar or cane sugar with a relatively small quantity of heroin hydrochloride (Rec. 39, 48, 55, 64, 78). Petitioner objected to the introduction in evidence of the samples (Rec. 79, 80, 81) on the ground of a material, fatal variance between allegation and proof, which was overruled and exception noted (Rec. 81). The point of fatal variance between allegation and proof was also raised by petitioner, at the conclusion of all of the evidence by motion to direct a verdict of not guilty, which was overruled, to which exception was noted (Rec. 82). The same point was also raised by petitioner's proffered prayers from Nos. 1 to 9, inclusive (Rec. 82-85), each of which was denied, and exception taken (Rec. 83-4-5).

In *St. Louis, San Francisco & Texas Ry. v. Scale*, 229 U. S. 156, at bottom of page 161, this Court said that "In short, the case pleaded was not proved and the case proved was not pleaded." The holding in that case seems to be peculiarly applicable to the instant case.

In *De Jonge v. Oregon*, 299 U. S. 353, at top page 362, this Court held that a "Conviction upon a charge not made would be sheer denial of due process."

3. Counts 1, 3, 5, 7 and 9 fail, and each fails, to allege a crime under the Harrison Anti-Narcotic Act in that it is alleged in each of the counts that the sale of the substance was made "not in pursuance of a written order from the said Rufus Ford on a form issued for that purpose by the Commissioner of Internal Revenue" whereas the authority to prescribe the written order was vested in the Commissioner of Narcotics and to distribtue the same to the Collectors of Internal Revenue, who, in turn, are authorized to

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issue the same upon payment of the tax therefor. In this connection, reference is hereby made to the statutes and treasury decisions heretofore set forth in the annexed petition (pages 1-20). Therefore, each of the odd numbered counts fails to state an offense by reason of the misdescription aforesaid, and each of them is bad, in accordance with the principle of law announced by this Court in *Fleisher et al. v. U. S.*, 302 U. S. 218 (1937, (reversing s. c. in 91 F. (2) 404) in which it is held that:

“Registration of stills for the production of distilled spirits should be with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue.

“A count charging conspiracy to commit the offense of possessing such stills ‘without having the same registered with the Collector of Internal Revenue, as required by law,’ is therefore bad.”

In each of the odd numbered counts (except 11) of the indictment, in the instant case, alleged, in describing the offense, that a sale was made not in pursuance of a written order from the said Rufus Ford, on a form issued in blank for that purpose by the Commissioner of Internal Revenue, whereas the allegation should have been, in substance, on a form prescribed by the Commissioner of Narcotics and issued by the Collector of Internal Revenue (and not by the Commissioner of Internal Revenue).

The opinion of the appellate court in the instant case questions “whether the per curiam decision in *Fleisher v. United States*, 302 U. S. 218 (1937), limits the above well-settled rule [referring to the *Berger* case]. Despite the apparent applicability of the *Berger* case to the facts of the *Fleisher* case, the government confessed error in the latter case, and no reasons given in that case indicate a narrowing of the general principle. We can discover no cases attempting to reconcile the apparent conflict” (Rec. 106, footnote).

May we suggest that the Berger case announced the general rule applicable when the question of a fatal variance is presented in a criminal case, whereas the Fleisher case applied the rule to specific facts presented. We submit that there is no conflict between the two cases, and the Court of Appeals, in the instant case, misconceived the said decisions of this Court, and failed to follow them.

If, as the said Court of Appeals held, there is a conflict (which we submit there is not) between the Berger case and the Fleisher case, then the Fleisher case, decided in 1937, is later and controls over the Berger case, decided in 1935. It is to be noted that the writ of certiorari was limited in the Fleisher case to the single point (302 U. S. 673, entitled *Harry Fleisher v. U. S.*; *Sam Fleisher v. U. S.* and *Stein v. U. S.*) whether the first count of the indictment stated an offense under federal law, which involved the point of fatal variance. This Court reversed 91 F. (2) 404, and the point upon which the case was reversed was not discussed or decided by the Circuit Court of Appeals. As we read the decision in the Fleisher case, the pivotal question was whether the first count stated an offense by reason of the fatal variance between the statute and the allegation in the indictment. It is our contention that this is not a mere technical objection but it is a fundamental question in view of the Fifth and Sixth Amendments to the Federal Constitution.

The Court of Appeals in the instant case seemed to stress that the decision in the Fleisher case was a per curiam one, but it would appear that that Court failed to appreciate that the decision was necessarily unanimous. That Court also held that "We can discover no cases attempting to reconcile the apparent conflict." The undersigned counsel confess that they do not understand this holding.

4. The Court of Appeals, in the instant case, sustained the ruling of the trial court in denying petitioner's motion to withdraw a juror and declare a mistrial on the ground of the misbehavior of two government witnesses. As set forth in the Statement of the Case all witnesses were put under the usual rule of separation.

The unusual method pursued by counsel for the prosecution in examining government witnesses partially, thereby limiting cross-examination, and thereafter constantly calling them for re-examination in chief, during the trial, which consumed from April 12, 1943 to April 19, 1943 (Rec. 28 and 7), was not only in effect, an invasion of the court's order made at the beginning of the trial, such procedure afforded witnesses opportunity to discuss the case, and resulted in the denial of a fair and impartial trial and of due process of law within the meaning of the Fifth Amendment to the Federal Constitution. The Record shows the above method of procedure. (Rec. 30-35; 45-47; 54-55; 61-63; 71-76; 35-38; 43-45; 52-54; 63-4; 67-70; 38-41; 47-50; 55-8; 64-66; 77-80).

Petitioner's motion to withdraw a juror and declare a mistrial on the ground of the misbehavior of two government witnesses, narcotic agents Trigstead and Fields, when said Trigstead admitted on the witness stand (Rec. 46-7) that during the noon recess of the court he and the witness Fields had discussed the testimony previously testified to by said Fields as to who in the office of the narcotic division (wherein the government exhibits or samples were kept) had access to the safe in said office, which resulted in a change in the testimony on the part (Rec. 47) of the witness Trigstead (who testified after said discussion between him and said Fields), despite the fact that the court had ordered all witnesses not to discuss the facts of this case with any one or among themselves, during the recess of court, during the pendency of this trial.

The Court of Appeals, in its opinion in the instant case, omitted to discuss or rule specifically as to the misbehavior of the government's witnesses, as above outlined, which formed the basis of petitioner's motion for a mistrial, although the point was stressed in the brief of petitioner filed in that Court. Therefore, petitioner renewed the question in his petition for rehearing (Rec. 113) and especially asked the Court to make a definite ruling in regard thereto to guide the trial courts of this jurisdiction, but the Court of Appeals denied the petition for rehearing, generally, without opinion.

We respectfully submit that it is imperative that a uniform rule of practice and procedure for all federal district courts be laid down by this Court as a guide, especially when the same witnesses are constantly called and re-called, for examination, in chief, to testify as to many counts of an indictment. The order of proof, being within the discretion of the trial court, we submit that when the witnesses are put under the usual rule, and thereafter purposely disobey the order of the court, and discuss the case with fellow-witnesses, a defendant is put at a great disadvantage, the result of which is he cannot obtain due process of law, or a fair trial. After such happening, which occurred in the instant case, it was the duty of the trial court, we submit, to grant defendant's motion for a mistrial.

5. The Court of Appeals in the instant case committed grave error, in violation of the Fourth and Fifth Amendments to the Federal Constitution (especially called to the attention of that Court) in sustaining the ruling of the trial court, over objection and exception of petitioner, in admitting in evidence a certain card-board box, which, according to the government chemist, a witness in behalf of the prosecution, contained 2,705 grains of a mechanical

mixture, consisting of 40.03 grains of heroin hydrochloride and the remaining 2,654.97 grains were milk sugar (Rec. 78). Said cardboard box was found by the narcotic agents, accompanied by local police acting in concert with said agents, on the roof of a shed located on property adjacent to petitioner's home and premises, after said agents and police had entered petitioner's home and back-yard, *without a warrant of arrest for petitioner and without a search warrant* (Rec. 69, 76). The said evidence, so illegally obtained, was used at the trial to convict the petitioner on the 11th and 12th counts of the indictment. The government offered no proof showing that said box and its contents belonged to the petitioner, nor was the same ever claimed by him, or that he ever had possession thereof. The said evidence was obtained by a general exploratory search, without any warrant of arrest or search warrant, of petitioner's home and premises by the narcotic agents and police officers accompanying them. The Court of Appeals in the instant case says "The government contends that since they were found on other property appellant has no standing to object to their seizure." And further:

"We need not decide this question because the appellant did not move before the trial for the suppression of this evidence or explain his failure to do so."

The opinion of the said Court of Appeals apparently adopts the contention of the prosecution, namely, that petitioner could not have objected to the use in evidence of things (contained in the box) because they were seized on property other than that of petitioner, regardless of the fact that petitioner never claimed to own the box and/or its contents, and no proof was offered at the trial that he was owner or custodian thereof. In thus ruling, the Court of Appeals overlooked the rule of law that defendant is required to allege ownership in personal property seized in violation of the Fourth Amendment to the Federal Con-

stitution in a motion to suppress evidence which he believes the prosecution intends to use against him. Since the petitioner never claimed ownership of the card-board box and/or contents, and having no notice from the prosecution, after his illegal arrest, or before trial, that the prosecution would offer in evidence the box and/or its contents, he was not required to file a motion prior to trial to suppress the evidence, and he was entitled to object to such evidence *at the trial*, which he did, but such objection was overruled, to which exception was taken, and the government succeeded in convicting petitioner, by the use of such evidence, on the 11th and 12th counts, and the court sentenced petitioner to imprisonment for 20 months to 5 years on count 11, and for a term of 40 months to 10 years on count 12.

The foregoing situation presents an exception to the ordinary rule requiring a motion before trial to suppress things unconstitutionally seized. *Agnello v. U. S.* 269 U. S. 20, 30, 31, 32, in which it is held at page 32: "While the question has never been directly decided by this Court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. *Boyd v. U. S.* 116 U. S. 616, 624-630; *Weeks v. U. S.* *supra*, 393; *Silverthorne Lumber Co. v. U. S.*, *supra* 391; *Gouled v. U. S.* 255 U. S. 298, 308. *The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant.*" (Italics supplied)

In *U. S. v. Tom Yu*, 1 Fed. Supp. 357 (D. C. Ariz.) a narcotic case, the court held that belief that the article sought is concealed in a dwelling does not justify a search without

warrant, notwithstanding the facts unquestionably show probable cause.

In *Taylor v. U. S.* 286 U. S. 1-6, the Court held that "suspicion that a person is engaged in violations of the prohibition law, confirmed by the odor of whisky and by peeping through a chink in a garage standing adjacent to his dwelling and part of the same premises, will not justify prohibition officers in breaking into the garage and seizing the whisky for the purpose of obtaining evidence of guilt. P. 5" (reversing 55 F. (2) 58). In that case, the Court says (bottom p. 5) the search and seizure were undertaken with the hope of securing evidence upon which to indict and convict the defendant. * * * "We think, in any view," said this Court "the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed."

6. The judgment imposing sentence upon petitioner is void for uncertainty and ambiguity, and the same is illegal, because said sentence deprives petitioner of due process of law under the Fifth Amendment to the Federal Constitution, and is violative of the Eighth Amendment to said Constitution in that it inflicts upon petitioner cruel and unusual punishment.

The language of the judgment (Rec. 11-12) imposing sentence upon petitioner is contained on page 9 of the Statement of the Case in attached petition praying for Certiorari, and reference thereto is respectfully asked.

The twelve sentences imposed on petitioner by the trial court are *in solido*, and petitioner was tried on all of the twelve counts of the indictment in one trial, and a general verdict of guilty was rendered (Rec. 7).

The sentences (Rec. 11-12) imposed upon petitioner are: 40 months to 10 years and pay a fine of five thousand dollars on count 2; and 40 months to 10 years on each of counts

4, 6, 8, 10 and 12, "*each count to run concurrently and concurrently with count two.*" (We presume that the trial court meant that *the sentence* on each of the counts 4, 6, 8, 10 and 12 is to run concurrently and concurrently with count two, but the judgment of the court fails to set that forth.)

The judgment continues (Rec. 11-12): "and Twenty (20) months to Five (5) years on count one, to take effect at expiration of sentence imposed on count two; and Twenty (20) months to Five (5) years on each of counts three, five, seven, nine, and eleven, *each count to run concurrently and concurrently with sentence imposed on count one.*" (Here again "each count" are the words used, instead of "sentence" on each count, and the judgment fails to definitely set forth a legal sentence.) It is our contention that the result is that the combined accumulated sentences are indefinite, ambiguous, and uncertain. Compare *Fleisher et al. v. U. S.* 302 U. S. 218, in which this Court held "when the first of several counts upon which consecutive sentences are based is defective the sentences should be corrected so as to fix a definite date for their commencement."

"Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." *U. S. v. Daugherty*, 269 U. S. 360.

In imposing the sentences, the trial court failed to observe Rule 1 of Rules of Practice and Procedure in criminal cases, promulgated by this Court, in that the court should have imposed sentence *first on count one* upon which petitioner *was first convicted*.

The irregularity of first imposing sentence of 40 months to 10 years on count 2, with concurrent sentences of similar duration on the remaining five even numbered counts, and then imposing concurrent sentences of 20 months to 5 years on the odd numbered counts prevents petitioner's eligibility

for parole until petitioner shall first serve the maximum sentence of 10 years on count 2.

The combined concurrent and consecutive sentences, under the circumstances, result in the deprivation of due process of law in violation of the Fifth Amendment to the Federal Constitution, and further, said sentences constitute cruel and unusual punishment within the meaning of the Eighth Amendment to the Federal Constitution. *Weems v. U. S.*, 217 U. S. 349, 375, 378. On page 378, in the *Weems* case, the Court says that "the clause in the Constitution in the opinion of the learned commentators may be therefore progressive, and not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (Cases.) On page 375, the Court cites approvingly the case of *State v. Driver*, 78 North Carolina, 423, 427, holding that a sentence of defendant for assault and battery upon his wife of imprisonment in the county jail for five years, and at the expiration thereof to give security to keep the peace for five years, in the sum of five hundred dollars with sureties, was held to be cruel and unusual punishment.

The history of the adoption of the Eighth Amendment to the Federal Constitution is reviewed and discussed in *Weems v. U. S. supra*.

WHEREFORE, it is respectfully submitted that the writ of certiorari should be granted.

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May 10, 1944.

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U.S. Supreme Court, D.C.
FILED
MAY 26 1944
CHARLES CLARK CLERK
OF COURT

No. 990

In the Supreme Court of the United States

OCTOBER TERM, 1944

CLARENCE GROMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	4
Argument	8
Conclusion	13

CITATIONS

Cases:

<i>Berger v. United States</i> , 295 U. S. 78	9
<i>Coleman v. United States</i> , 26 F. (2d) 870	8
<i>Fleisher v. United States</i> , 302 U. S. 218	9, 10
<i>Guilbeau v. United States</i> , 288 Fed. 731	8
<i>Goldstein v. United States</i> , 316 U. S. 114	11
<i>Hirabayashi v. United States</i> , 320 U. S. 81	12
<i>Kitt v. United States</i> , 132 F. (2d) 920	11
<i>Nailling v. United States</i> , decided February 9, 1942, certiorari denied, 316 U. S. 675	10
<i>Perlman v. United States</i> , 247 U. S. 7	11
<i>Segurola v. United States</i> , 275 U. S. 106	12
<i>United States v. Feldman</i> , 104 F. (2d) 255, certiorari denied, 308 U. S. 579	11

Statutes involved:

Act of February 9, 1909, 35 Stat. 614, as amended, 21 U. S. C. 174	3
--	---

Internal Revenue Code, 26 U. S. C. 2553, 2554, 2557:

Sec. 2553	4
Sec. 2554	4, 9
Sec. 2557	13

Constitution:

Eighth Amendment	2
------------------------	---



In the Supreme Court of the United States

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No. 990

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 104-106) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered March 20, 1944 (R. 107), and a petition for rehearing (R. 108-113) was denied April 7, 1944 (R. 114). The petition for a writ of certiorari was filed May 10, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was a material variance between the charges of the indictment and the Government's proof.

2. Whether Counts 1, 3, 5, 7 and 9 fail to state offenses under Section 2554 (a) of the Internal Revenue Code. This depends on whether the Commissioner of Internal Revenue possesses the authority to issue order forms for the purchase of narcotics.

3. Whether the court committed reversible error in refusing to declare a mistrial because two narcotic agents who were government witnesses discussed, during a recess in the trial, certain evidence in the case, although the court at the beginning of the trial had directed that all witnesses be separated.

4. Whether the court committed reversible error in admitting in evidence a box, the ownership of which petitioner denies, which was taken without a search warrant from a shed on premises adjoining petitioner's.

5. Whether the sentences imposed on petitioner are ambiguous and whether they constitute cruel and unusual punishment within the meaning of the Eighth Amendment.

STATUTES INVOLVED

The Act of February 9, 1909, 35 Stat. 614, as amended, 21 U. S. C. 174, provides in part:

If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Section 2553 of the Internal Revenue Code (26 U. S. C. 2553) provides in part:

(a) * * * It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by

the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

Section 2554 of the Internal Revenue Code (26 U. S. C. 2554) provides in part:

(a) * * * It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary [of the Treasury].

STATEMENT

On November 30, 1942, petitioner was indicted in the United States District Court for the District of Columbia in twelve counts charging violations of the Harrison Narcotic Act (26 U. S. C. 2553, 2554) and the Narcotic Drugs Import and Export Act (21 U. S. C. 174) (*supra*) (R. 1-5). Counts 1, 3, 5, 7, and 9 charged that on various specified occasions he wilfully sold to one Rufus Ford certain quantities of a derivative of opium, viz., heroin hydrochloride, not in pursuance of written orders from Ford on forms issued for that purpose by the Commissioner of Internal Revenue

(R. 1-4). Counts 2, 4, 6, 8, 10, and 12 charged that on specified occasions he fraudulently and knowingly received, concealed, bought, sold, and facilitated the transportation and concealment of quantities of heroin hydrochloride knowing that it had been illegally imported into the United States (R. 2-5). The eleventh count charged that he wilfully purchased a specified quantity of heroin hydrochloride which was not then in original stamped packages, nor from original stamped packages (R. 5).

Petitioner was found guilty by the jury on all counts (R. 7) and he was sentenced to imprisonment "for the period of Forty (40) months to Ten (10) years and [to] pay a fine of Five Thousand (\$5,000.00) Dollars on count two; and Forty (40) months to Ten (10) years on each of counts four, six, eight, ten, and twelve, each count to run concurrently and concurrently with count two; and Twenty (20) months to Five (5) years on count one, to take effect at expiration of sentence imposed on count two; and Twenty (20) months to Five (5) years on each of counts three, five, seven, nine, and eleven, each count to run concurrently and concurrently with sentence imposed on count one; * * *" (R. 11-12). Upon appeal to the Court of Appeals for the District of Columbia the judgment was affirmed (R. 107).

The evidence adduced at the trial in support of counts 1 to 10 related to petitioner's possession and

sale of various quantities of narcotics on five different occasions. The Government's evidence in respect of counts 1 and 2, which is illustrative of all the evidence under the first ten counts of the indictment, may be summarized as follows:

On August 24, 1942, Rufus Ford, a paid informer of the Bureau of Narcotics of the Treasury Department, was advised by petitioner that if he wanted any heroin, he had "some pretty good stuff." Two days later, working in cooperation with Government narcotic agents, Ford went to petitioner's home and told him that he wanted to get an ounce of "stuff." Petitioner told him he would sell him a little less than one ounce for \$35, and he delivered an envelope to Ford in return for payment of \$35. In respect of this transaction Ford testified, "I took the envelope from the defendant and gave him \$35.00 and I did not give the defendant any order form or written order issued by the Commissioner of Internal Revenue or any other person". Immediately after leaving petitioner's home, Ford surrendered the envelope to the Government agents. (R. 28-30.) Upon chemical examination it was found to contain 289.6 grains of a mixture of heroin hydrochloride and cane sugar. Of the entire quantity, 4.29 grains was heroin hydrochlorine and the remainder was cane sugar, apparently used as a filler. (R. 39.)¹

¹ Heroin hydrochloride is a derivative of opium. Since the mixture was only mechanical, the mixture of cane sugar and heroin did not destroy the identity of the latter (R. 39).

The evidence in respect of counts 11 and 12, charging petitioner with having purchased and concealed 2,705 grains of heroin hydrochloride which had been illegally imported into this country, and which was not in the original stamped packages, nor from them, shows that on September 24, 1942, narcotic agents and local police went to petitioner's home to arrest him. As they entered his premises they observed petitioner in his backyard throwing something which "looked like trash" into the air. Immediately thereafter the agents found a blue stationery box with a rubber band around it on the roof of a shed on the premises adjoining petitioner's; the box contained several spoons and eight small envelopes, each of which contained a white powdered substance. Neither the box nor the envelopes had revenue stamps on them. (R. 68-70, 71-75, 76-78.) The envelopes were found upon analysis to contain a total of 2,705 grains of heroin hydrochloride and milk sugar which had been mechanically mixed together, but neither of which had lost its identity (R. 78). Ford had earlier testified that when he dealt with petitioner, the latter obtained the heroin which he sold him from a "bluish" cardboard box about the size of a writing paper box which had a rubber band around it, and that he had observed several envelopes and spoons in the box (R. 51, 66). Although Ford was unable positively to identify the box which the agents found as the one which he had observed in petitioner's

home, he testified that it looked like that box (R. 66-67).

Petitioner did not offer any testimony in his own defense, but, instead, rested at the conclusion of the Government's case (R. 82).

ARGUMENT

Petitioner asserts five grounds of alleged error, none of which, we submit, has any merit.

1. The fact that the indictment identified the narcotic as heroin hydrochloride and the proof showed that the substance which petitioner sold as heroin was a mechanical mixture of heroin hydrochloride and sugar does not, as petitioner contends (Pet. 2, 15-16, 23-25), establish a material variance. The testimony of the government chemist Spear showed that, despite the mixture, the narcotic retained its identity and was separable from the sugar (R. 39, 78). In these circumstances it is plain that petitioner dealt in heroin as charged in the indictment; the fact that he also sold sugar as heroin is of no significance. Contrary to petitioner's assertion (Pet. 15-16, 24), the decision below is not in conflict with *Guilbeau v. United States*, 288 Fed. 731 (C. C. A. 5), or *Coleman v. United States*, 26 F. (2d) 870 (C. C. A. 8). For in those cases a fatal variance was found to exist in the fact that the indictment specified a different drug than that which was proved at the trial. In the instant case no such inconsistency exists.

Similarly, there is no fatal variance in the fact that the proof did not show the same number of grains of the narcotic as the indictment alleged. Since petitioner was selling a mixture of heroin hydrochloride and sugar as heroin, it was peculiarly within his own knowledge that the quantities of the mixture traced to him and charged in the indictment were not exclusively heroin hydrochloride. Plainly, the variance was insignificant and subjected petitioner to no surprise at the trial. *Berger v. United States*, 295 U. S. 78, 82.

2. In reliance on *Fleisher v. United States*, 302 U. S. 218, petitioner further contends (Pet. 3, 16-18, 25-27) that counts 1, 3, 5, 7, and 9 fail to state an offense under Section 2554 (a) of the Internal Revenue Code (*supra*, p. 4), because each charges that the sale of the narcotic was not made in pursuance of a written order of the purchaser on a form "issued in blank for that purpose by the Commissioner of Internal Revenue," whereas legal authority to issue such forms is vested in the Commissioner of Narcotics. In rejecting this contention the court below properly held (R. 105) that pursuant to the applicable statutes and Treasury regulations the power to prescribe order forms has been delegated to the Commissioner of Narcotics and that authority to issue such forms is vested in the Commissioner of Internal Revenue. The court below cited as authority for its holding on this point the un-

reported order of the Circuit Court of Appeals for the Sixth Circuit in *Nailling v. United States*, decided February 9, 1942.² On petition for certiorari in the *Nailling* case the same contention as petitioner here urges was raised, and this Court denied the petition. 316 U. S. 675, No. 1042, October Term, 1941.³ Since the Commissioner of Internal Revenue possessed the necessary authority to issue the forms the *Fleisher* decision obviously is not in point.

3. Petitioner argues (Pet. 3, 12-13, 18, 28-29) that the trial court should have declared a mistrial when it appeared that, contrary to the court's order separating the witnesses (R. 28), Government witness Trigstead, a narcotic agent who had previously testified concerning a safe in the Narcotic Bureau's office, asked another agent during

² The order in the *Nailling* case reads in pertinent part as follows:

"And it appearing that while the indictment charges that the sale of morphine sulphate was not made in pursuance of a written order on a form issued by the Commissioner of Internal Revenue, and Section 2554 (a) requires that the order be written on "a form to be issued" by the Secretary of the Treasury, the Secretary is authorized by statute to delegate and has delegated authority to the Commissioner of Internal Revenue to issue such order forms. Act of March 3, 1927 [44 Stat. 1381, Sections 4 (a) and 4 (b)]; Treas. Dec. No. 3999, issued March 18, 1927; Treas. Dec. No. 1 (Bureau of Prohibition), issued April 1, 1927; Act of June 14, 1930 [46 Stat. 585, Section 3 (b)]; Treas. Dec. No. 2 (Bureau of Narcotics), issued July 1, 1930; Section 2606, Title 26, I. R. C.; Treas. Dec. No. 4884, issued February 11, 1939; * * *

³ The relevant statutes and regulations are discussed in the Government's brief in opposition in that case.

the noon recess what persons had access to the safe (R. 46-47). When the incident was brought to the attention of the court, it cautioned the witness against repeating such conduct, but denied petitioner's motion for a mistrial (R. 47). At the time of the occurrence the trial was well under way; the discussion among the agents related to a question of fact which was of little significance at the trial; and the incident was known to the court and the jury and could be considered by them in weighing agent Trigstead's testimony. In the circumstances, petitioner having made no showing of prejudice, it is clear that the trial court did not abuse its discretion in refusing to declare a mistrial.

4. Petitioner contends (Pet. 3, 14, 18-19, 29-32) that the blue stationary box containing heroin hydrochloride which the arresting officers found on his neighbor's property (*supra*, p. 7) was improperly received in evidence, because it was obtained by an illegal search and seizure. In the first place, however, since petitioner denies that the box was his (Pet. 30-31) and the evidence shows that it was taken from the roof of a shed located on another's premises, he has no status to complain of the manner in which the box was obtained. *Kitt v. United States*, 132 F. (2d) 920, 921-922 (C. C. A. 4); *United States v. Feldman*, 104 F. (2d) 255 (C. C. A. 3), certiorari denied, 308 U. S. 579; cf. *Goldstein v. United States*, 316 U. S. 114, 121; *Pearlman v. United States*, 247

U. S. 7, 13-15. Secondly, petitioner made no effort to have the evidence suppressed before trial, nor did he at the trial offer any excuse to the court for his failure to do so. Instead, he simply objected to testimony relating to the entry "in defendant's home or upon his premises * * * on the ground that * * * no warrant of arrest had been obtained for defendant, and that no search warrant had issued authorizing the search of defendant's premises or his home" (R. 71, 81). In these circumstances his objection was properly overruled. *Segurola v. United States*, 275 U. S. 106.⁴ Moreover, the evidence to which petitioner objects relates only to counts 11 and 12 and the sentences imposed on those counts were ordered to run concurrently with the sentences on counts 1 and 2; consequently it is unnecessary to consider the validity of the convictions on these counts in order to sustain the judgment. *Hirabayashi v. United States*, 320 U. S. 81, 85, 105, and cases cited.

5. Petitioner's contention (Pet. 4, 14, 19, 32-34) that the judgment (*supra*, p. 5) is ambiguous, because the court in imposing the sentences under counts 4, 6, 8, 10 and 12 ordered "each count to run concurrently and concurrently with count 2" and in imposing the sentences under

⁴ Since the box in question was not taken from petitioner's premises, it would appear that even his objection at the trial was insufficient to raise any question of unlawful search and seizure.

counts 3, 5, 7, 9 and 11 ordered "each count to run concurrently and concurrently with sentence imposed on count 1", is frivolous. Obviously the failure of the court to use the terminology "the sentence on each count to run concurrently," as petitioner suggests, does not divest the judgment of its clear meaning. Equally frivolous is petitioner's contention (Pet. 32-34) that the sentences totalling 5 to 15 years' imprisonment for twelve offenses constitute cruel and unusual punishment. The sentences were well within the maximum which might have been imposed under the twelve counts. (21 U. S. C. 174, *supra*, p. 3; 26 U. S. C. 2557 (b) (1).)

CONCLUSION

The case was correctly decided below and there is no conflict of decisions. We therefore respectfully submit that the petition for certiorari should be denied.

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MAY 1944.